

**IN THE UNITED STATES COURT OF
APPEALS FOR VETERANS CLAIMS**

LEROY S. ROBINSON, JR.)	
Appellant,)	
)	
v.)	
)	Vet. App. No 15-715
ROBERT A. McDONALD,		
Secretary of Veterans Affairs,)	
Appellee.		

**APPELLANT'S OPPOSED MOTION FOR AN ORDER FINDING
THE SECRETARY IN CONTEMPT OF THE COURT'S JULY 14, 2016
ORDER**

Pursuant to U.S. Vet. App. R. 27(a) and 38 U.S.C. §7265(a), the Appellant respectfully moves this Honorable Court to issue an Order finding that the Secretary is in contempt of the Court's July 14, 2016 Order. A separate motion requesting Court imposed monetary sanctions has been filed contemporaneously with this motion.

Pursuant to R. 27, counsels for the Secretary, Jesse Greenstein, Esq. and Thomas Sullivan, Esq. were contacted regarding the filing of this motion. The Secretary's Counsel has indicated that the Secretary is **opposed** to this motion and that he will be filing written opposition.

Brief Statement of Post-Decisional Facts

This Court issued a per curium Order on July 14, 2016:

The court issued its panel decision on July 14, 2016. The decision, in pertinent part, Ordered the Secretary to 1) within 15 days of the date of the Order

to assemble all of Appellant's paper source documents and provide them to appellant's representative for review under Rule 10(d), and report to the Court that he has done so, and if he is unable to do so, the Secretary must detail the reasons why he could not.

In an attempt to facilitate compliance, Appellant's counsel immediately emailed the Secretary and proposed at least three available dates to review the file within the 15 day compliance period.

The Secretary, however, ignored Appellant's counsel's proposals and failed to assemble and to provide the paper source documents to Counsel within the fifteen day time period. In addition, the Secretary failed, within the compliance period, to timely file a notice to the Court stating either that he has complied with the Order, or explaining why he was unable to do so.

On August 10, 2016, the Court issued an Order, in part, directing the Secretary, within 7 days, to submit his response to the Court's July 14, 2016 Court order along with a motion for leave to file late, and also to explain why this Court should not impose sanctions against the Secretary for non-compliance with the Court order.

In an August 17, 2016 response, the Secretary contended that the paper source documents were sent to the regional office and that the documents are awaiting Appellant's review. Further, in a pleading filed on August 24, 2016, the Secretary repeats the foregoing, but adds that the VARO communicated with Appellant's counsel on August 23, 2016.

When it became apparent that the Secretary's General Counsel was not coordinating the file review as required by the rules, Appellant's Counsel made efforts to coordinate the appointment by contacting both the General Counsel as well as the agency. An appointment for file review was confirmed by all parties for August 30, 2016 at 11:00 a.m. All parties, including Appellant's Counsel, the Secretary's Counsel and the Assistant VSCM were in firm agreement on the date

and time scheduled for the appointment.

Appellant's Counsel appeared at the Philadelphia VARO on August 30, 2016, not only promptly, but one hour early at 10:00 a.m. After waiting 1.5 hours in the reception area, however, a representative appeared and advised Counsel that the paper source documents were not available for review. Therefore, a file review would not take place on this date and time. The representative further advised that the file had been sent to VCIP on August 17, 2016, and to a scanning vendor on August 19, 2016. The representative explained that the documents in the paper file have not yet been added to VBMS.

Appellant's counsel, despite 1) having cleared her schedule for that date, 2) making special arrangements for the review, and 3) having traveled a considerable distance to the VARO therefor, was forced to leave the VARO without having been afforded the opportunity to review the paper documents pursuant to this Court's Rule 10(d), and the Court's July 14, 2016 Order.

Although the Secretary's Counsel has filed a response to the Court's September 1, 2016 Order, the Secretary has failed to adequately explain how and why he or his staff persons would confirm an appointment to review a paper file at the VARO, at a date and time certain on August 26, 2016 without confirming or determining the whereabouts of the file. The appointment was scheduled for August 30, 2016. But when Counsel arrived for the review, the VARO representative advised Appellant's counsel that the paper documents have been off the premises at least since August 19, 2016. This date is seven days before the appointment confirmation was made and eleven days before the actual appointment date. Thus, the Secretary has offered no reasonable explanation for his failure and/or refusal to provide access to the file in compliance with the Court Order.

Perhaps more indicative of a motive on the part of the Secretary is the end result which culminated with the events of August 30, 2016 when Appellant's

Counsel appeared at the VARO only to be told that “the paper source documents are unavailable.”

The documents were, perhaps, strategically not available.¹ This could conceivably be a part of the Secretary’s “strategic concern” which is expressed in his August 17th motion. The strategy appears to be to make it “appear” that the Secretary is complying in order to evade sanctions, while he strategically evades compliance with the Court Order because he seeks an appeal within the 60 day time period.

While asserting at page 5 of his motion that “none of the Secretary’s conduct here...can in any way be classified as “abusing the judicial process”, it would appear that this is exactly what the Secretary has done. By setting up a “strawman” appointment, then failing to produce the file, premised on an inexcusable “mix-up”, the Secretary has succeeded in abusing the judicial process by virtue of his “strategy”. To date, the Secretary has failed to produce the paper records for inspection by Appellant.

In his most recent September 8, 2016 filing, the Secretary takes a cavalier attitude regarding the seriousness of these failures. He asserts, that the missing file was simply a “regrettable inconvenience” to counsel. He ignores the fact that Mr. Robinson has been further denied due process because, after almost two years, his case remains in limbo at the initial records dispute stage. This is solely due to the Secretary’s failure or refusal to comply with the Court rules. He also completely ignores the fact that these “failures” further tax this Court’s already fragile judicial resources.

It is time for this court to show the Secretary who is in control. First, the Secretary should be held in contempt for disobeying a Court Order, Second, he

¹ Who could ever conceive of a situation where a service center manager, at the behest and instruction of the agency’s counsel, would set up an appointment with Appellant’s counsel pursuant to a court Order, but neither be competent enough nor have the good sense to confirm the location and availability of the file prior to confirming the appointment.

should be reminded that each time he fails to heed a Court Order, there are monetary consequences, whether through payment of judicial fines, counsel fees or both. (See separate motion filed by Appellant requesting sanctions)

A reading of page 2 of the Secretary's filing of September 8, 2016, makes it abundantly clear that the Secretary's Counsel just **does not appreciate the gravity** of this Court's July 14, 2016 order. After describing Appellant's pleading which describes a "cryptic two sentence response", he states: "It remains unclear what further communication Appellant's counsel was expecting, what in the Secretary's emails were "cryptic" and why she believes any further response from counsel at that time was required." In light of the Court's July 14, 2016 Order which clearly contemplates cooperation, and coordination on both sides in order to move the file review forward, this is a stunning statement by the Secretary's counsel. Far more telling, however, is the Secretary's not so subliminal message in the Secretary's August 17, 2016 motion. He makes it very clear that he does not believe that he must produce the file as ordered because to be forced to do so would affect his appeal rights.

Since Appellant's Counsel has already explicitly detailed all communications with the Secretary in prior pleadings, Counsel elects not to "get into the gutter" with the Secretary, by responding to the Secretary's skillful "spin" on the so-called "correspondence," and who said what to whom and when, etc. See Secretary's September 8th response.

Counsel wishes to assert to the Court, however, that pages 4-5 of the GC's pleading is indicative of why there are so many mistakes. This is CAVC Rule 10 compliance. The General Counsel cannot delegate this task to the RO and expect the staff at the agency to follow through. First of all, the agency staff is wholly unqualified to comprehend the Court rules and the consequences of non-compliance. It was the General Counsel's complete responsibility to

coordinate the Rule 10(d) appointment.²

Moreover, it is quite clear that Appellant's counsel has been so misled to the extent that she now believes that any further promises or representations from VA representatives is tantamount to a statement from Pannocho. It remains to be seen just how far that nose will grow.

At page 5 of his September 8, 2016 pleading, the Secretary once again “spins” the facts and seems to suggest that it was Appellant’s Counsel’s fault because “she at no time contacted the Office of General Counsel in general, or the undersigned counsels in particular, to ask questions, express her understandable frustration, or request further information or assistance.” It would appear as though the Secretary’s Counsel would have garnered some pleasure by virtue of counsel “expressing her frustration” or “asking questions” or “requesting further information”. But, after the actual harm has occurred, what remedy exactly does the Secretary imply that he could have provided.? Contrary, however, to Mr. Greenstein’s pleading, the VA representatives advised Appellant’s counsel **while she was still at the VARO** that Mr. Sullivan had already been notified.³ In fact, an extended conversation ensued thereafter whereby Mr. Antonovich summoned the assistant VSCM, Garrick Younger, to join in the conversation. Both agency representatives indicated that Mr. Sullivan was aware of the so called “mix-up”, but mentioned no instructions from him. It is

² Appellant’s Counsel has reviewed many paper claims files at the RO. She has never been required to contact agency staff people, and no one from the agency has ever contacted her. It is the General Counsel’s responsibility to coordinate the entire review. Counsel furnishes available dates and times to the GC, the GC contacts the agency, confirms the responsible person and appointment time and then follows up with Appellant’s counsel. Appellant’s counsel is provided with the contact person’s name at the VARO so that she can provide the name to the receptionist at the time of review.

³ It was Mr. Sullivan who was noticed on the confirmation email, and the contact person with whom the agency representatives were in touch. Mr. Sullivan had previously advised Appellant’s counsel in an email that Mr. Greenstein was away on leave.

respectfully submitted that unless Mr. Sullivan is a magician, he could not have magically produced the file while counsel was waiting. Why does the Secretary complain that Counsel did not personally contact them while she was still at the VARO?

And since it was the Secretary, not the Appellant, who botched the appointment, why is it that the Secretary did not immediately reach out to Appellant's counsel to apologize or propose further assistance?. It was not until September 7, 2016 (a full eight days after the debacle) that Mr. Greenstein expressed his regrets in an email to Appellant's Counsel. These are the "un-spun" facts. We should not get this twisted.

Argument

This Court clearly has the power to enforce its Orders and to punish parties who disobey those lawful orders. The power of federal courts to punish contempt of its orders "is thought to be an inherent and integral element of its power and has deep historical roots See *Wright, et. al., Federal Practice and Procedure*, 2960 at 366 (2nd ed. 1995). See also e.g. *Ex parte Robinson*, 86 U.S. (19 Wall) 505, 510 (1874).

In addition, the Court's statutory contempt authority arises under 38 USC §7265. Section 7265(a)(3) is relevant to this case, and provides:

The Court shall have power to punish by fine or imprisonment such contempt of its authority as –

(3) disobedience or resistance to its lawful writ, process, order, rule decree, or command.

Federal courts also have the inherent power to sanction misconduct. *Jones v. Derwinski*, 1 Vet. App. 596, 606 (1991), quoting Section 7265 and adding that, "Even if Congress had not chosen to convey express authority to punish for contempt, this Court would have the power to sanction those who abuse the judicial process under the "inherent power of the federal courts[.]" citing for

support *Chambers v. NASCO*, 501 U.S. 32, 33, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991); and, citing *Anderson*, 6 Wheat. at 227, 5 L.Ed. at 248 for the proposition that, “courts of justice are . . . vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates”.

In *Ribaudo v. Nicholson*, 31 Vet. App. 137 (2007), the Court had to determine whether contempt findings were appropriate. In this case, however, Appellant, respectfully contends that the Court is well beyond having to make *Ribaudo* findings. The Secretary's actions are "**per se**" in contempt of court on numerous fronts, to wit:

- The July 14, 2016 Court Order directed the Secretary to produce the file within 15 days and report this to the Court, or explain to the Court why he could not do so. **The Secretary did not comply.**
- The Court issued a August 10, 2016 show cause order for the Secretary to explain why he should not be sanctioned for non-compliance. The Secretary quickly responded by stating that the file was at the VARO awaiting review by Appellant's Counsel. **This statement was false.**
- Appellant's Counsel confirmed an appointment with the Secretary's Counsel for August 30, 2016. Appellant's Counsel appeared at the VARO on August 30, 2016 at the confirmed place and time, expecting to review the paper folder. However Counsel was advised that the paper folder was not at the VARO, but rather at a scanning vendor for the purposes of uploading the paper documents into VBMS. **Even though already under the threat of sanctions, the Secretary still failed to produce the file at the appointed date and time.**
- The General Counsel misrepresented the facts to the Court by

making prior false statements regarding the whereabouts of the paper claims file, as well as the location and availability of the paper file on August 30, 2016, the date of a planned review. **It is clear that the Secretary does not take the Orders of this Court seriously. Despite the Order, the Secretary has failed to produce the paper documents.**

The actions described above demonstrate that the Secretary has disobeyed the clear and unambiguous terms of the Court's July 14, 2016 Court Order. The Secretary was implored to take the actions directed in the Court Order within 15 days. The Secretary has elected and refused to take the actions required by the Order. The Secretary's August 17, 2016 pleading, in particular, makes clear that he disagrees with the Court's Order and that he believes that to produce the file for inspection would affect his appeals rights. This statement is tantamount to an explicit refusal to comply. Thus, the Secretary should be deemed to have intentionally refused to comply with the Court's Order. The Secretary's actions heretofore are indefensible.

CONCLUSION

For the foregoing reasons, the Court should issue an Order holding the Secretary in contempt of this Court's July 14, 2016 per curiam Order.

WHEREFORE, Appellant respectfully moves the Court for an Order finding the Secretary in contempt of the Court's July 14, 2016 Order, and for such other, further and different relief as to this Court is just, proper and equitable. .

Respectfully submitted,

/s/ Tara R. Goffney. Esq.,

Counsel for Appellant

PO 678

Bronx, New York 10469

(718) 515-0700